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No. _____ OFFICE OF THE CLERK

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In The Supreme Court of the United States

MARVIN SPRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are plea agreements to be interpreted strictly in accordance with contract law principles, or do the due process protections of the Fifth and Fourteenth Amendments give defendants added protection when courts construe the terms of plea agreements?

2. Did the district court violate the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in sentencing the Petitioner using drug amounts which were not found by the jury?

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OPINIONS AND ORDERS BELOW

The unpublished ruling of the United States Court of Appeals for the Fourth Circuit affirming the conviction of the Petitioner was issued on May 23, 2002, and is set out in the Appendix at A-1. The order of the Court of Appeals denying the Petition for Rehearing submitted by codefendant Gracie Flossie Spry was issued on July 2, 2002, and is set out in the Appendix at A-6. The transcript of the oral ruling of the district court denying the Petitioner's motion to dismiss the indictment appears in the Appendix at A-7.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The order of the United States Court of Appeals for the Fourth Circuit affirming the conviction of the Petitioner was entered on May 23, 2002. The Petitioner's codefendant, Gracie Flossie Spry, filed a Petition for Rehearing on June 6, 2002, which the Court of Appeals denied on July 2, 2002 and, thus, this Petition is timely pursuant to Sup. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law[.]

The Fourteenth Amendment states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

Proceedings Below

The Petitioner, Marvin Spry, was named along with codefendants Ricky Gene Carter, Harold Gene Baisden Jr., Mark E. Jones, and Anthony Allen Shadd in a six-count indictment returned on January 17, 2001 by a grand jury sitting in the United States District Court for the Southern District of West Virginia. Count 1 of the indictment charged Spry with engaging in a conspiracy to distribute marijuana from November of 1995 to February of 2000. Counts 2, 4, and 5 of the indictment alleged that Spry possessed marijuana on June 6, 1999, November 9, 1999, and January 25, 2000 with the intent to distribute. Count 3 of the indictment alleged a money-laundering violation on October 14, 1999, and Count 6 charged that Spry intimidated a witness on December 29, 2000.

On March 14, 2001, Spry filed a motion to dismiss the indictment on the basis of the fact that the prosecution of the charges in the indictment was barred by a plea agreement reached between Spry and the government on February 1, 2000, which had resolved an earlier prosecution against Spry for possession of a firearm by felon. The district court held a hearing on the motion on May 16, 2001 at which it orally denied the motion. (A-7.)

On March 28, 2001, a superseding indictment was returned which added a count alleging that Spry had conspired to distribute cocaine with codefendants Gracie Spry and Marvin Derek Spry. Spry was tried with these two codefendants on May 29, 2001 to June 4, 2001 and was

convicted on each charge. On September 19, 2001, Spry was sentenced to 40 years on both Counts 1 and 7, 20 years on both Counts 2 and 3, 5 years on both Counts 4 and 5, and 10 years on Count 6, all of which were imposed consecutively, for a total term of 140 years in prison.

Spry and Gracie Spry appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed their convictions on May 23, 2002. On appeal, Spry argued that (1) the district court had misapplied the law in denying the motion to dismiss the indictment, and (2) the trial court misapplied the law in determining the base offense level for his offense on several of the counts of the indictment. Gracie Spry submitted a Petition for Rehearing on June 6, 2002, which was denied by the court on July 2, 2002.

Statement of Facts

On February 7, 2000, Marvin Spry pleaded guilty to the charge of possession of a firearm by felon in violation of 18 U.S.C. § 922(g)(1), for which he had been indicted on November 30, 1999. The charge arose out of an incident which occurred on November 9, 1999 when Spry shot at Cletus Robbins, who had entered his home without his consent in an attempt to collect on a drug debt. Spry's guilty plea was entered as part of a plea agreement between the government and Spry, under which Spry admitted guilt in exchange for the government's promise not to prosecute certain other possible charges against Spry.

In particular, the plea agreement recited on page 1 that Spry was charged with one count of violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and noted that under the agreement the resolution of the charges would be that Spry would plead guilty. On page 2 of the agreement, the government set forth the maximum potential penalty which Spry faced under the plea, which was simply the maximum statutory sentence. The

agreement also called for the cooperation by Spry with law enforcement agencies and specified that Spry would be required to give grand jury and trial testimony upon request of the United States. Immunity was addressed on page 3 of the agreement, as the government promised that "nothing contained in any statement or testimony provided by Mr. Spry pursuant to this agreement, or any evidence developed therefrom, will be used against Mr. Spry, directly or indirectly, in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines." (A-28.) The agreement further provided that "[t]here are *no agreements,* understandings or recommendations *as to* any other pending or *future charges* against Mr. Spry *in any Court other than the United States District Court for the Southern District of West Virginia.*" (A-30 (emphasis added).)

The conduct resulting in the charges contained in the indictment in the current prosecution predated the plea agreement of February 1, 2001 with the exception of the charge in Count 6 of intimidating a witness. In fact, the government's investigation into the conduct of Spry began before the actions which resulted in the prior charge and plea agreement, as the investigation was commenced on September 3, 1999, several months prior to the use of the firearm by Spry on November 9, 1999. Moreover, the marijuana that forms the basis of Count 4 of the indictment was seized by police on November 9, 1999 from Spry's property during the investigation of the shooting of Robbins.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO CLARIFY THE EXTENT TO WHICH DUE PROCESS PRINCIPLES GOVERN THE INTERPRETATION OF PLEA AGREEMENTS.

In *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987), Justice Brennan noted that "[t]his Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." Despite the passage of 25 years since Justice Brennan's observation, the Court still has not addressed this important issue, leaving lower courts to apply different and conflicting legal principles to the interpretation of plea agreements and immunity agreements. In particular, the issue of the extent to which the due process protections of the Fifth and Fourteenth Amendments apply to the resolution of plea agreement disputes has never been directly addressed by the Court. This case gives the Court the opportunity to rectify that omission and to give lower courts the guidance necessary to fairly resolve conflicts over the scope of plea agreements.

A.

This Court first touched on the need for consideration of fairness in the resolution of disputes concerning plea agreements in *Santobello v. New York*, 404 U.S. 257 (1971). Without direct reference to the Due Process Clause, the Court held that it would be unfair to uphold the guilty plea entered by the defendant where the facts showed that he had been promised by the prosecutor that no sentence recommendation would be made to the sentencing court, when in fact at sentencing the state urged the maximum punishment. In holding that the state was bound by the promise, the Court

recognized that there must be "fairness in securing agreement between an accused and a prosecutor," *id.* at 261, and that while "circumstances will vary," courts should ensure that the plea bargaining process is "attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances." *Id.* at 262.

Since the decision in *Santobello,* the Court has on occasion addressed issues arising out of plea agreements but has not developed further the extent to which due process principles should govern the resolution of disputes concerning the enforcement of plea agreements. *See Ricketts v. Adamson* (defendant's failure to comply with plea agreement by refusing to testify at codefendants' retrial as required in agreement removed double jeopardy bar to prosecution of defendant on original charges after defendant had been sentenced on lesser offense); *Mabry v. Johnson,* 467 U.S. 504 (1984) (conditions for valid plea presuppose fairness in securing agreement between accused and prosecutor); *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (Due Process Clause is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged); *Blackledge v. Allison,* 431 U.S. 63 (1977) (habeas corpus petitioner entitled to hearing or full opportunity to present relevant facts to determine whether his guilty plea was induced by unkept oral agreement which did not appear in written record).

Justice Brennan, speaking for the four dissenters in *Ricketts v. Adamson,* urged a careful consideration of due process and plea bargains, noting that while principles of commercial contract law can be a useful point of departure in construing a plea agreement,

> commercial contract law can do more than this, because plea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

483 U.S. at 16.

The failure of this Court to adopt clear standards for the review of plea agreements has resulted in confusion and conflict in the lower courts. While the view expressed by Justice Brennan in *Ricketts v. Adamson* has been echoed in a number of lower court decisions, *see, e.g., Innes v. Dalsheim*, 864 F.2d 974, 978 (2d Cir. 1988) ("[T]he law of commercial contracts plays only a limited role in resolving a plea dispute"); *United States v. Baird*, 218 F.3d 221 (3d Cir. 2000) (the government may not rely upon a rigid and literal construction of the terms of a plea or cooperation agreement; such agreements are to be construed in light of special due process concerns), other courts have minimized the importance of constitutional due process in the resolution of disputes concerning the scope and enforcement of plea agreements. *See United States v. Cantu*, 185 F.3d 298 (5th Cir. 1999) (court of appeals applies general principles of contract law in order to interpret terms of plea agreement); *United States v. Williams*, 198 F.3d 988 (7th Cir. 1999) (a plea agreement is a contract); *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993) ("Plea agreements are contractual in nature and are measured by contract law standards"); *United States v. Bunner*, 134 F.3d 1000 (10th Cir. 1998) (court construes plea agreement according to principles of contract law).

The view that basic notions of fundamental fairness guaranteed by the Due Process Clause should guide courts in deciding disputes arising out of plea bargains is compelled by the obvious fact that the parties to such agreements simply do not come to the bargaining table in the same capacity as ordinary commercial parties. On the one hand, the defendant comes to the bargaining table in a weakened position. Accused of a crime, incarcerated, cut off from traditional sources of support, often ignorant of his rights, and perhaps only hastily counseled by an attorney, a criminal defendant is not likely to make the same manner of decisions concerning his contract which would be expected of a party to a commercial contract.[1] On the other hand, the prosecutor comes to the negotiations with the full power of the government at his disposal.

Moreover, this Court has long recognized that a prosecutor is not simply the representative of one of two equal parties to a criminal proceeding but, rather, occupies a special position by virtue of his authority as the representative of the government. As noted in *Berger v. United States*, 295 U.S. 78, 88 (1935), the government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court has thus found in a variety of contexts that in bringing a criminal prosecution the government's attorney has an overriding obligation to ensure that the proceedings are conducted with fairness and in conformity

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[1]For a particularly unfortunate example, see *Stokes v. Armontrout*, 851 F.2d 1085 (8th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989) (defendant's one-day hesitance to plead guilty to a reduced charge pursuant to plea agreement, based on his ignorance and his misunderstanding of what had transpired in a prior plea, cost him a concurrent sentence of imprisonment and ultimately resulted in his receiving the death penalty).

with due process. *Berger v. United States* (improper statements of prosecutor at trial violated due process rights of defendant); *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of exculpatory evidence by prosecutor violates Due Process Clause); *United States v. Marion*, 404 U.S. 307 (1971) (Due Process Clause may provide basis for dismissing an indictment if the defense can show at trial that prosecutorial delay in bringing the accusation has prejudiced the right to fair trial); *Santobello v. New York*; *cf. Jacobson v. United States*, 503 U.S. 540 (1992) (due process precludes prosecution where government initiates crime by implanting disposition to commit crime in the mind of the defendant).

Because of the nature of a criminal prosecution and the attendant imbalance in the respective roles of the defendant and the government, it must be established by the Court that the ordinary rules of contracts are not totally dispositive in plea agreement disputes. Instead, in conformity with the Court's precedent in *Santobello v. New York*, concepts of fundamental fairness must guide the courts in resolving such conflicts.

B.

The Fourth Circuit opinion in this case referred to a "heightened standard to which the Government is held in reviewing the terms of a plea agreement" (A-3 (citing *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997))), but did not acknowledge the importance of due process to the resolution of the issue presented to the court. Moreover, by summarily denying the contention that the plea agreement barred the prosecution of Spry, simply because a strict reading of the language of the agreement referred only to a firearm offense and not a drug conspiracy, the Fourth Circuit ignored the understanding of the parties and failed to grant to Spry the benefit of his bargain with the government in a manner which

comported with the fundamental fairness required by due process.

Indeed, in examining the precise text of the agreement it can be seen that Spry agreed to plead guilty in exchange for literally nothing in return, as the bare language of the agreement reveals that the government made no explicit promises to Spry, and Spry obtained no benefit from his guilty plea on the face of the agreement. Clearly, however, Spry had to have had a reason for pleading guilty, and the circumstances underlying the making of the agreement show that the reason was his reasonable expectation under the agreement that the plea to the firearms charge would preclude any charges on the drug conspiracy which the government was then investigating and which was the cause of the firearms incident.

In particular, by virtue of the final paragraph in the plea agreement, Spry reasonably believed that by pleading guilty under the terms of the agreement he would not face further charges arising out of the incident in the United States District Court for the Southern District of West Virginia. The plain import of that sentence was that an understanding had been reached between the parties concerning future prosecutions within the Southern District of West Virginia. Spry's interpretation was reasonable because the government's investigations of the drug conspiracy was well under way, and nearly completed, at the time of the entry of the guilty plea pursuant to the agreement. Indeed, at trial, just about all of the evidence introduced against Spry was in the possession of the United States on February 1, 2000.

A proper approach to the resolution of the issue of the scope of the plea agreement in this case would have included an examination of all of the relevant circumstances surrounding the agreement, rather than simply looking at the bare language of the agreement. Fundamental fairness

requires that a defendant get something in return for his guilty plea, in accordance with what he believed he was getting. The district court should have recognized that the United States did not deal fairly with Spry, and that by misleading him into inducing his guilty plea without releasing him from prosecution on the other charges arising from the drug conspiracy the government was violating the fundamental fairness component of the Fifth Amendment.

This Court must adopt clear principles, incorporating due process guarantees, which guide courts in the interpretation of plea agreements and immunity agreements so that individuals like Spry do not give up their rights without receiving any benefits in return. Accordingly, the Court should grant Spry's Petition for Writ of Certiorari.

II. THE DISTRICT COURT MISAPPLIED THE PRINCIPLES OF *APPRENDI v. NEW JERSEY* IN SENTENCING SPRY.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court determined that in any criminal prosecution the government must submit to the jury for its determination, by proof beyond a reasonable doubt, any facts which enhance a defendant's sentence beyond the prescribed statutory sentence. This Court has further recognized that in federal drug cases, where the amount of the sentence for a particular offense varies depending on the amount of drugs involved in the offense, the government must allege in the indictment, and the jury must find, the drug quantity which determines the sentence. *United States v. Cotton*, 122 S. Ct. 1781 (2002).

These principles were violated in the present case and, unlike the facts presented to the Court in *United States v. Cotton*, the violation of the *Apprendi* rule was not harmless error. Because under the *Apprendi* rule drug quantity is an element of the offense, it is clear that in any case under 21

U.S.C. §§ 841 and 846, before a defendant can be sentenced to any of the progressively higher statutory maximums that are based on progressively higher quantities of drugs specified in § 841(b)(1)(A) or (B), the government must state the drug type and quantity in the indictment, submit the required evidence to the jury, and prove the relevant drug quantity beyond a reasonable doubt. Because the actual sentence imposed on a defendant under the guidelines also may be enhanced by the amount of the drugs within the statutory categories, the principles of *Apprendi* further compel the government to obtain jury verdicts which establish the amount of drugs used for the imposition under the Sentencing Guidelines. Thus, to satisfy *Apprendi*, the government must also prove beyond a reasonable doubt any drug amount which enhances the base offense level under U.S.S.G. § 2D1.1.

In this case, the record reveals that the superseding indictment charged Spry with conspiring to distribute more than 100 kilograms of marijuana and more than 500 grams of cocaine. However, in sentencing Spry, the district court used U.S.S.G. § 5G1.2(d) to group the offenses of conviction and determined the base offense level by holding Spry accountable for drug amounts—a total of over 6,635 kilograms of marijuana equivalency which were far above those alleged in the indictment and determined by the jury. As a result, the base offense level for the drug amounts was 34, rather than the proper level of 26, which corresponds to the 100 kilograms of marijuana and 500 grams of cocaine charged in the indictment. The district court's calculation had the effect, after other sentencing factors were applied, of putting Spry in the guidelines range of life imprisonment. As a consequence, the district court imposed consecutive sentences on each count to reach the statutory maximum sentences for each count, totaling 140 years in prison. Had the offense level been properly calculated by reference to the amount of drugs charged in the indictment and found by the jury, Spry's sentence could have been between 210 and 262 months, not

life, and the sentences on other offenses would not have been made consecutive to satisfy the requirements of U.S.S.G. § 5G1.2(d). Thus, rather than facing life in prison, Spry could have received a far more lenient sentence.

It is this disparity in sentences in view of the disparity in the amount of drugs charged in the indictment and found by the jury which compels the conclusion that the error was not harmless. *Cf. United States v. Cotton.* Accordingly, this Court must review the sentencing of Spry in order to distinguish this situation from that presented in *United States v. Cotton* and to grant justice to Spry.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Marvin Spry, requests this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

MARVIN SPRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARVIN SPRY, *Defendant-Appellant.*	No. 01-4789

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GRACIE FLOSSIE SPRY, *Defendant-Appellant.*	No. 01-4817

Appeals from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CR-01-11)

Submitted: April 30, 2002

Decided: May 23, 2002

Before MICHAEL, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

John Kevin West, MCCOY & WEST, Lexington, Kentucky; Charles R. Coy, COY, GILBERT & GILBERT, Richmond, Kentucky, for Appellants. Kasey Warner, United States Attorney, R. Booth Goodwin, II, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Marvin Spry and Gracie Flossie Spry appeal their convictions and sentences for their roles in a large scale conspiracy to distribute marijuana and cocaine. A seven count indictment charged Marvin and Gracie Spry with conspiring to distribute in excess of 100 kilograms of marijuana (Count I), and more than 500 grams of cocaine (Count VII), in violation of 21 U.S.C. § 846 (1994). In addition, the indictment charged Marvin Spry with possession of more than fifty kilograms marijuana with intent to distribute in violation of 21 U.S.C. § 841(a) (1994) (Count II), money laundering in violation of 18 U.S.C. § 1956 (1994) (Count III), aiding and abetting possession with intent to distribute an unspecified amount of marijuana in violation of 21 U.S.C. § 841(a) (Count IV & V), and intimidation of a potential witness against him in violation of 18 U.S.C. § 1512(b)(3) (1994). The indictment arose out of the Sprys' participation in a large scale conspiracy to distribute

marijuana and cocaine centered on the family's fifty acre tract in southern West Virginia. After a joint trial, Marvin Spry was convicted on all seven counts of the indictment and Gracie Spry was convicted on both counts lodged against her.

In challenging his conviction, Marvin Spry first contends that the district court erred in declining to dismiss the charges against him in this case based on the terms of a plea agreement governing his entry of a guilty plea in a prior criminal action. We review the district court's interpretation of the plea agreement de novo. *United States v. Harvey*, 791 F.2d 294, 300-01 (4th Cir. 1986). Even under the heightened standard to which the Government is held in reviewing the terms of a plea agreement, *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997), the language of the prior plea agreement does not bar the second unrelated prosecution relating to the controlled substance conspiracy. The plea agreement, by its terms, referred only to a firearm offense stemming from a shooting at the Spry residence. The prosecution based on the drug distribution conspiracy was separate from and not governed by the plea agreement. The district court did not err in declining to dismiss the indictment against Marvin Spry.

Both Marvin and Gracie Spry next suggest that the district court erred determining the drug quantity used to reach the appropriate sentences. The Sprys contend that the district court erred by failing to submit to the jury a specific amount of controlled substances prior to reaching a sentencing decision. The Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 490. In this case, the drug quantities were charged in the indictment and submitted to the jury on a special verdict form. The jury found the Sprys guilty of conspiring to distribute more than 100 kilograms of marijuana,

found Marvin Spry guilty of aiding and abetting the possession of more than fifty kilograms of marijuana, and found both Sprys guilty of conspiring to distribute more than 500 grams of cocaine.

In suggesting that the district court erred in determining the applicable Offense Level under the Sentencing Guidelines, the Sprys contend that the district court was limited to the smallest amount of controlled substance found by the jury on each of the counts. However, *Apprendi* does not apply to a judge's exercise of discretion within a statutory range so long as a defendant's sentence is not set beyond the maximum term specified in the substantive statute. *See United States v. Kinter*, 235 F.3d 192, 199-200 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001). In each count of conviction involving an element increasing the penalty for the crime, the Sprys' sentences were not set beyond the statutory maximum for the amount found by the jury. Neither did the district court commit clear error in arriving at a quantity of controlled substances to determine the base Offense Level under the Sentencing Guidelines. *United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir. 1994). Consequently, there is no reversible error in the district court's imposition of sentences on the counts of conviction.

Finally, we have no difficulty in concluding that the district court did not abuse its discretion in denying Gracie Spry's motion for severance. *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir. 1995). Gracie Spry failed to demonstrate that she would be unduly prejudiced by the joint prosecution. *See United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir. 1984) (holding defendant must make strong showing of prejudice). Nor was there clear error in the district court's failure to instruct the jury regarding multiple conspiracies. *United States v. Mills*, 995 F.2d 480, 485 (4th Cir. 1993). Gracie Spry is ultimately unable to demonstrate that she was involved in a separate conspiracy unrelated to the overall conspiracy

charged in the indictment. *United States v. Howard*, 115 F.3d 1151, 1157 (4th Cir. 1997); *United States v. Kennedy*, 32 F.3d 876, 884 (4th Cir. 1994).

Finding no merit to the Sprys' claims of error on appeal, we affirm their convictions and sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 2, 2002

No. 01-4817
CR-01-11

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

GRACIE FLOSSIE SPRY

Defendant-Appellant

ENTERED
JUL - 5 2002

SAMUEL L. KAY, CLERK
U. S. District & R_____
Southern District of West Virginia

Lead Case: 1-4789 US v. Marvin Spry

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

[Ruling of the Court of Appeals Denying Rehearing]

THE COURT: Mr. West, it looks to me like all the plea agreement does is to terminate the prosecution of Mr. Spry in this district for offenses that Mr. Spry may have committed relating to his purchase of the two weapons that are noted in the agreement and that includes the possession of those weapons. I just don't see any language there that absolves him from anything else.

MR. WEST: Your Honor, there is no language—you are correct. I guess our contention is that if you look at paragraph 12 of the agreement, that by implication that there could be an understanding, and Mr. Spry contends it's his understanding, that the agreement would cover any charges under investigation at that time and certainly this investigation was underway at the time when the—and when I say this investigation, I mean the one pertaining to the current indictment was underway at the time that he executed the plea agreement.

THE COURT: It just seems to me that it doesn't purport to do that at all. And accordingly, the Court will deny the motion to dismiss.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL NO. 2:01-00011

MARVIN SPRY - 01
GRACIE FLOSSIE SPRY - 06
M. DERRICK SPRY - 07

VERDICT

COUNT ONE of the Superseding Indictment charges defendants MARVIN SPRY, GRACIE FLOSSIE SPRY and M. DERRICK SPRY with conspiring to distribute more than 100 kilograms of marihuana, in violation of Title 21, United States Code, Section 846.

As to the charge in Count One, we the jury find:

MARVIN SPRY	✓ Guilty	___ Not Guilty
GRACIE FLOSSIE SPRY	✓ Guilty	___ Not Guilty
M. DERRICK SPRY	✓ Guilty	___ Not Guilty

COUNT TWO of the Superseding Indictment charges defendant, MARVIN SPRY, aided and abetted (18 U.S.C. § 2) by others with possessing with intent to distribute more than 50 kilograms of marihuana (21 U.S.C. § 841(a) (1)).

As to charge in Count Two, we the jury find:

MARVIN SPRY	✓ Guilty	___ Not Guilty

COUNT THREE of the Superseding Indictment charges defendant, MARVIN SPRY with a money laundering offense in violation of Title 18, United States Code, Section 1956 (a) (1) (B) (i).

As to the charge in Count Three, we the jury find:

MARVIN SPRY ✓ Guilty ___ Not Guilty

COUNT FOUR of the Superseding Indictment charges defendant, MARVIN SPRY and another and aided and abetted by each other (18 U.S.C. § 2) with possession with intent to distribute marihuana (21 U.S.C. § 841 (a) (1)).

As to the charge in Count Four, we the jury find:

MARVIN SPRY ✓ Guilty ___ Not Guilty

COUNT FIVE of the Superseding Indictment charges defendant, MARVIN SPRY, aided and abetted by others (18 U.S.C. § 2) with distribution for remuneration a quantity of marihuana (21 U.S.C. § 841 (a) (1)).

As to the charge in charge in Count five, we the jury find:

MARVIN SPRY ✓ Guilty ___ Not Guilty

COUNT SIX of the Superseding Indictment charges defendant, MARVIN SPRY with an obstruction offense in violation of Title 18, United States Code, Section 1512 (b) (3).

As to the charge in Count Six, we the jury find:

MARVIN SPRY ✓ Guilty ___ Not Guilty

COUNT SEVEN of the Superseding Indictment charges defendants, MARVIN SPRY, GRACIE FLOSSIE SPRY and M. DERRICK SPRY, with conspiring to distribute more than 500 grams of cocaine in violation of Title 21, United States Code, Section 846.

As to the charge in Count Seven, we the jury find:

MARVIN SPRY	✓ Guilty	___ Not Guilty
GRACIE FLOSSIE SPRY	✓ Guilty	___ Not Guilty
M. DERRICK SPRY	✓ Guilty	___ Not Guilty

June 4, 2001
Date

/s/
Foreperson

RECEIVED SEP 26 2001

ENTERED
SEP 24 2001
SAMUEL L. KAY, CLERK
U. S. District & Bankruptcy Courts
Southern District of West Virginia

UNITED STATES DISTRICT COURT
Southern District of West Virginia

UNITED STATES OF AMERICA

v.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 2:01-00011-01

Marvin Spray

John Kevin West, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) one, two, three, four, five, six and seven of the seven-count indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section Numbers	Nature of Offense	Date Offense Concluded	Count
21 U.S.C. Section 846	Conspiracy to Distribute in Excess of 100 Kilograms of Marijuana	02/28/2000	one

21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2	**Aiding and Abetting the Possession With Intent to Distribute in Excess of 50 Kilograms of Marijuana**	**06/06/1999**	**two**

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ____

☐ Count(s) ____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc Sec No.: 235-88-3984
Defendant's Date of Birth: 12/25/1953
Defendant's USM No.: 02382-088
Defendant's Residence Address
Route 2, Box 3898
Dingess, West Virginia 25671

September 19, 2001
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

JOHN T. COPENHAVER, JR.
United States District Judge
Name & Title of Judicial Officer

Defendant's Mailing Address.

Same as above.

A TRUE COPY CERTIFIED ON
SEP 24 2001
SAMUEL L. KAY, CLERK
U. S. District & Bankruptcy Courts
Southern District of West Virginia
By /s/ Deputy

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 U.S.C. Section 1956 (a)(1)(B)(i)	**Laundering of Monetary Instruments**	**10/14/1999**	**three**
21 U.S.C. Section 841(a) (1) and 18 U.S.C. Section 2	**Aiding and Abetting the Possession With Intent to Distribute Marijuana**	**11/09/1999**	**four**
21 U.S.C. Section 841(a) (1) and 18 U.S.C. Section 2	**Aiding and Abetting the Possession With Intent to Distribute Marijuana**	**01/25/2000**	**five**
18 U.S.C. Section 1512 (b)(3)	**Witness Intimidation**	**12/29/2000**	**six**
21 U.S.C. Section 846	**Conspiracy to Distribute in Excess of 500 Grams of Cocaine**	**11/30/1998**	**seven**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 140 years, consisting of 40 years on each Counts One and Seven, 20 years on each Counts Two and Three, 5 years on each Counts Four and Five and 10 years on Count Six, all of which are to run consecutively, for a total term of 140 years,

which 140-year term is to run concurrently, as of September 19, 2001, with the remainder of the 70-month federal term that he is currently serving.

☒ The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to the Federal Correctional Institution in Beckley, West Virginia, or such other institution as close to his home in Logan County, West Virginia, as feasible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY US MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____ **5 years.** _____
The five-year term of supervised release consists of five years on Counts One and Seven and 3 years on each of Counts Two, Three, Four, Five and Six, all of which is to run concurrently, for a total term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment,

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons:

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) you shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;

15) you shall not purchase or possess a destructive device or other dangerous weapon at any time;

16) you shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer.

SPECIAL CONDITIONS OF SUPERVISION

17) The defendant shall submit to random urinalysis or any other drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program, including in-patient substance abuse treatment, as directed by the probation officer.

18) The defendant shall pay the special assessment and the fine within the time and as directed by the court.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 700.00	$ 5,000.00	$ _____

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 1 8 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(9).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
_____	_____	_____	_____
_____	_____	_____	_____
Totals:	_____	_____	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ in full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____, or

D ☐ in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ to commence _____ after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The $700 special assessment shall be paid out of prison earnings at the rate of $25 per month commencing on November 1, 2001, and due on the first day of each month thereafter until paid in full. Once the special assessment has been paid, the $5,000 fine shall be paid out of prison earnings to the maximum extent feasible on the first day of each month until paid in full.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

The forfeiture of the defendant's interest in $4,050 in United States currency and one Harley Davidson motorcycle, as set forth in the final order of forfeiture entered on August 31, 2001, is hereby deemed final pursuant to Rule 32(d)(2) of the Federal Rules of Criminal Procedure.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall

be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

[Seal]

U.S. Department of Justice

COPY

United States Attorney
Southern District of West Virginia

United State Courthouse
300 Virginia Street, E
Room 4000
Charleston, West Virginia 25301
FAX: (304) 347-5104

Mailing Address:
Post Office Box 1713
Charleston, West Virginia 25326-1713
(304) 345-2200
1-800-659-8726

January 31, 2000

Mary Lou Newberger
Assistant Federal Public Defender
Federal Public Defender's Office
300 Virginia Street, East
Charleston, West Virginia 25301

Re: United States v. Marvin Spry
Criminal No. 2:99-00233 (USDC SDWVa)

Dear Ms. Newberger:

This will confirm our conversations with regard to your client, Marvin Spry (hereinafter "Mr. Spry"). As a result of these conversations, it is agreed by and between the United States and Mr. Spry as follows:

1. **PENDING CHARGES.** Mr. Spry is charged in a one-count indictment with a violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) (felon in possession of a firearm).

2. **RESOLUTION OF CHARGES.** Mr. Spry will plead guilty to a violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) as charged in said indictment.

/s/ 2-1-2000
MARVIN SPRY Date Signed
Defendant

/s/
MARY LOU NEWBERGER Date Signed
Counsel for Defendant

EXHIBIT
1

3. **MAXIMUM POTENTIAL PENALTY.** The maximum penalty to which Mr. Spry will be exposed by virtue of this guilty plea is as follows:

(a) Imprisonment for a period of 10 years;

(b) A fine of $250,000.00, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater;

(c) A term of supervised release of 3 years;

(d) A mandatory special assessment of $100.00 pursuant to 18 U.S.C. § 3013; and

4. **SPECIAL ASSESSMENT.** Prior to the entry of a plea pursuant to this plea agreement, Mr. Spry will tender a check or money order to the Clerk of the United States District Court for $100.00, which check or money order shall indicate on its face the name of defendant and the case number. The sum received by the Clerk will be applied toward the special assessment imposed by the Court at sentencing. Mr. Spry will obtain a receipt of payment from

the Clerk and will tender a copy of such receipt to the United States, to be filed with the Court as an attachment to this plea agreement. Failure by the defendant to provide proof of payment of the special assessment prior to or at the plea proceeding will automatically void this plea agreement. In the event this plea agreement becomes void after payment of the special assessment, such sum shall be promptly returned to Mr. Spry.

5. **COOPERATION.** Mr. Spry will be forthright and truthful with this office and other law enforcement agencies with regard to all inquiries made pursuant to this agreement, and will give signed, sworn statements and grand jury and trial testimony upon request of the United States. In complying with this provision, Mr. Spry may have counsel present except when appearing before a grand jury.

6. **USE IMMUNITY.** Unless this agreement becomes void due to a violation of any of its terms by Mr. Spry, nothing contained in any statement or testimony provided by Mr. Spry pursuant to this agreement, or any evidence developed therefrom, will be used against Mr. Spry, directly or indirectly, in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines.

7. **LIMITATIONS ON IMMUNITY.** Nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from any information and testimony provided pursuant to this agreement, in determining the applicable guideline range or in prosecuting Mr. Spry for any violations of federal or state laws. The United States reserves the right to prosecute Mr. Spry for perjury or false statement if such a situation should occur pursuant to this agreement.

8. **APPEAL OF FINE.** The United States and Mr. Spry agree that neither will seek appellate review of any order of the District Court imposing a fine unless the fine imposed is in excess of the range provided for the offense of conviction by the United States Sentencing Guidelines.

9. **FINAL DISPOSITION.** The matter of sentencing is within the sole discretion of the Court. The United States has made no representations or promises, and will make no recommendation, as to a specific sentence. However, the United States reserves the right to:

(a) Inform the Probation Office and the Court of all relevant facts and conduct;

(b) Address the Court with respect to the nature and seriousness of the offense;

(c) Respond to questions raised by the Court;

(d) Correct inaccuracies or inadequacies in the presentence report;

(e) Respond to statements made to the Court by or on behalf of Mr. Spry;

(f) Advise the Court concerning the nature and extent of Mr. Spry's cooperation; and

(g) Address the Court regarding the issue of Mr. Spry's acceptance of responsibility.

10. **VOIDING OF AGREEMENT.** If either the United States or Mr. Spry violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept this agreement, it shall be void.

11. **TERMINATION OF PROSECUTION.** The conviction and final disposition of Mr. Spry pursuant to this plea agreement will conclude the prosecution of Mr. Spry by the United States in the Southern District of West Virginia for offenses Mr. Spry may have committed relating to Mr. Spry's purchase of a Ruger, Mark II, 22 caliber pistol, serial number 21200903, and a Colt Officers ACP Series 80, 45 caliber pistol, serial number FA37528, on or about March 6, 1999, and possession of the same firearms on or about March 9, 1999.

12. **ENTIRETY OF AGREEMENT.** This written agreement constitutes the entire agreement between the United States and Mr. Spry in this matter. There are no agreements, understandings or recommendations as to any other pending or future charges against Mr. Spry in any Court other than the United States District Court for the Southern District of West Virginia.

Acknowledged and agreed to on behalf of the United States:

REBECCA A. BETTS
United States Attorney

By: /s/
STEVEN I. LOEW
Assistant United States Attorney

SIL/dlw

I hereby acknowledge by my signature at the bottom of each page of this five-page agreement that I have read, understand and agree to each of the terms and conditions set forth in this agreement.

/s/
MARVIN SPRY

2-1-2000
Date Signed

/s/
MARY LOU NEWBERGER
Counsel for Defendant

1 Jan 2000
Date Signed